No. 96-1829

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners were properly required to surrender to the Crow Tribe of Indians the proceeds of taxes unlawfully imposed on the Tribe's reservation coal in violation of the Tribe's federally guaranteed rights, where the taxes were paid by the company extracting the coal pursuant to a lease agreement with the Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 92 F.3d 826, amended, 98 F.3d 1194. The opinion of the district court (Pet. App. 17-57) is unreported.

Previous opinions in the case include (1) the initial opinion of the district court (Pet. App. 197-227), reported at 469 F. Supp. 154; (2) an opinion of the court of appeals reversing and remanding that decision (Pet. App. 167-196), reported at 650 F.2d 1104, amended, 665 F.2d 1390 (*Crow I*); (3) the opinion of the district court on remand (Pet. App. 110-166), reported at 657 F. Supp. 573; (4) an opinion of the court of appeals reversing that decision (Pet. App. 88-109), reported at 819 F.2d 895 (*Crow II*); (5) a memorandum order of this Court (Pet. App. 87) summarily affirming the judgment in *Crow II*, reported at 484 U.S. 997; (6) an unreported opinion of the district court on remand (Pet. App. 67-86), and an unreported order of certification for interlocutory appeal of that decision (Pet. App. 61-66); and (7) an

opinion of the court of appeals dismissing the interlocutory appeal (Pet. App. 58-60), reported at 969 F.2d 848 (*Crow III*).

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1996. Petitions for rehearing were denied on November 21, 1996 (Cross-Pet. App., No. 96-1894, at 1-2) and February 21, 1997 (Pet. App. 228-229). The petition for a writ of certiorari was filed on May 16, 1997, and was granted on October 14, 1997 (118 S. Ct. 294). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. For at least three hundred years, the Crow Tribe of Indians (the Tribe) has inhabited what is now the southern part of the State of Montana. Upon encountering these horse-riding people in the mid-18th century, the French called them "les beaux hommes." The Tribe was loyal to the United States through the wars with the Sioux during the 19th century. A territory of more than 30 million acres of land was recognized for the Tribe in the First Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749. The Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, formally established a Crow Reservation of approximately 8 million acres, "set apart for the absolute and undisturbed use and occupation" of the Tribe. *Id.* at Art. II. Subsequent Acts of Congress, however, gradually reduced the size of the Reservation as portions were opened to settlement by non-Indians. The current Reservation measures approximately 2.3 million acres. See *Montana* v. *United States*, 450 U.S. 544, 547-548 (1981); Department of Commerce, Economic Development Administration, *American Indian Reservations and Trust Areas* 400 (1996); see also R. Lowie, *Myths and Traditions of the Crow Indians* ix (1993).[1]

a. This case concerns taxes imposed on the extraction and sale of coal held in trust by the United States as part of the Crow Tribe's reservation mineral estate under a tract of land called the "ceded strip." That tract was originally ceded to the United States as part of an agreement under which the Tribe surrendered about 1,137,500 acres of land so that they could be opened to settlement by non-Indians. Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352; see *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 163-165 (1920) (discussing 1904 Act and ceded strip); Pet. App. 18-19. The 1904 Act approving that agreement obligated the United States to continue to hold the land on the ceded strip in trust for the Tribe pending disposition to non-Indians under various public land laws, and it provided that the Tribe would receive the proceeds of that disposition as they were realized. Art. II, 33 Stat. 357; *Ash Sheep Co.*, 252 U.S. at 164-165. The various provisions of the 1904 Act were "all intended to secure to the Indians the fullest value possible for what were referred to in the agreement as 'their lands' and to make use of the proceeds for their benefit." *Id.* at 165. "It is obvious that the relation thus established by the act between the Government and the tribe was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*." *Ibid.*

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[1] Despite the reduction in the size of its Reservation and its historically amiable relations with non-Indians, the Tribe has maintained its own language and traditions intact; more than 80% of enrolled tribal members still speak the Crow language. *American Indian Reservations and Trust Areas*, *supra*.

The surface rights to much of the land in the area covered by the 1904 Act were sold to non-Indian settlers, but the United States retained a large portion of the underlying mineral estate in trust for the Tribe. *Id.* at 19, 116. In 1958, Congress passed a law restoring to certain Indian Tribes, including the Crow Tribe, all surplus tribal lands that had been opened for non-Indian settlement but that had not been disposed of. See Act of May 19, 1958, Pub. L. No. 85-420, § 1, 72 Stat. 121. The Department of the Interior interpreted the 1958 Act as restoring 10,000 acres of surface land held by the United States, and approximately 150,000 acres of severed mineral rights in the ceded strip, to the Tribe. Pet. App. 119-121.[2] Section 2 of the Act provides that the restored lands "shall be held by the United States in trust for the respective tribe," and "such lands are hereby added to and made a part of the existing reservations for such tribe or tribes." 72 Stat. 121. Thus, the 1958 Act restored 10,000 acres of surface land and 150,000 acres of mineral estate in the ceded strip

[2] In Section 3 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 463, Congress had authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation that had been opened to entry prior to 1934. Immediately thereafter, the Secretary temporarily withdrew all remaining surplus lands, pending restoration to the Tribes concerned. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 Interior Dec. 559 (1934). That withdrawal order applied to both surface lands and mineral rights, *id.* at 563, and it expressly included Crow Reservation lands that had been opened under the 1904 Act, *id.* at 561. The Crow Tribe's surplus lands and reserved mineral rights on the ceded strip were not restored pursuant to Section 3 of the IRA, however, because the Crow Tribe voted not to accept the provisions of the IRA. Pet. App. 117. The 1958 Act was intended to put non-IRA Tribes on an equal footing with IRA Tribes with respect to the restoration of surplus or ceded lands. *Id.* at 118.

to the Crow Reservation in full trust status. Pet. App. 94-95, 195, 286.

b. In 1972, the Tribe and Westmoreland Resources, Inc. (Westmoreland) entered into a coal-mining lease agreement pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq*. Pet. App. 171, 200. The agreement granted Westmoreland the right to extract coal located in the ceded strip. Shortly after the lease was renegotiated and Westmoreland began mining operations, Pet. App. 122, Montana in 1975 imposed a severance tax and a gross proceeds tax on all coal produced in the State, including coal belonging to the Tribe. *Id.* at 6, 23.[3]

The severance tax rate was set at 30% of the contract sales price of the coal extracted by Westmoreland, while the gross proceeds tax rate was approximately 5% of the contract sales price. Pet. App. 25-26. The total was "more than twice that of any other state's coal taxes." *Id.* at 98 n.2.[4] It is not disputed for present purposes that the goal of those state taxes was "to appropriate most of the economic rent" from tribal coal. *Id.* at 10, 185.[5]

Before the taxes were imposed by the Montana Legislature, the Tribe expressed its strong opposition, informing the Legislature that such a rate of taxation on the extraction of tribal resources from reservation lands would improperly intrude on tribal sovereignty and self-deter-

[3] Although enacted pursuant to state statute, the gross proceeds tax was ultimately payable to petitioner Big Horn County. Pet. App. 19-20, 25-27.

[4] See also Report of the Montana Free Joint Conference Committees on Coal Taxation (Apr. 14, 1975), J.A. 63 ("It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry.").

[5] "'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." Pet. App. 185 n.12.

mination. J.A. 53, 56-57. The Tribe proposed as a compromise that coal producers be given a credit against state taxes for any taxes paid to Indian Tribes. See J.A. 60-61. That proposal was rejected. Pet. App. 23. The minutes of the Montana Senate Taxation Committee explain that "[t]he feeling was that there would have to be court decreed settlements regarding Indian coal revenues." J.A. 59. As the Ninth Circuit later concluded, there was "direct evidence that the Montana Legislature was aware that the taxes were potentially preempted and expected [litigation] would be required to resolve their legality." Pet. App. 9.

Westmoreland began paying Montana's tax on the severance of tribal coal from tribal lands in 1976, and the gross proceeds tax from the sale of the coal in 1975. Pet. App. 23-27. From 1975 to 1982, for example, petitioners realized $30 million from the coal in taxes (about 79 percent of total proceeds in excess of the return to Westmoreland) while the Tribe received about $8 million in royalties (about 21 percent of those proceeds). *Id.* at 172. Of the $46.8 million in severance taxes Westmoreland paid between 1976 and 1983, a significant percentage was placed in a Montana trust fund containing only the proceeds of severance taxes imposed on Montana coal producers. *Id.* at 24-25, 173; see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 613 (1981). As of June 30, 1993, the book value of that trust fund was in excess of $500 million. J.A. 25.

c. In 1976, the Tribe enacted its own severance tax of 25% of the contract price of coal mined on the Reservation. Pet. App. 19. The Department of the Interior approved the tax except as applied to coal mined from beneath the ceded strip. J.A. 283. The Department believed taxation on the ceded strip was beyond the power of the Tribe under Article IV, Section 20 of its Constitution, which author-

ized the Tribe to impose taxes upon nonmembers only when they were "doing business within the boundaries of the Crow Indian Reservation." J.A. 283.

The court of appeals subsequently held, however, that the mineral estate under the surface of the ceded strip in fact formed part of the Reservation. Pet. App. 94-95, 195. As a result, the district court concluded in 1988 that the Department's approval of the tax as applied to coal mined within the Reservation "was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal" on the ceded strip. *Ibid.* The district court explained (*ibid.*):

> [T]he Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland's mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal.[6]

Westmoreland did not pay taxes to the Tribe between 1976 and 1982. Instead, it challenged the validity of the Tribe's tax as applied to coal extracted from the ceded strip. Westmoreland's "objection to the tribal tax was motivated by the desire to avoid concurrent taxation" by Montana and the Tribe—which would have produced total tax rates exceeding 50%—and by concerns that it could not pass on to utility customers the costs of a tax absent approval by the Department of the Interior. Pet. App. 31.

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[6] Petitioners did not dispute that conclusion in the court of appeals, and they do not dispute it here.

In a 1982 amendment to its lease, approved by the Secretary, Westmoreland agreed to pay a tribal tax equal to that imposed by Montana, subject to a credit for all severance and gross proceeds taxes it was required to pay to Montana. *Id.* at 31-32; J.A. 135-141. Because of the higher taxes imposed by Montana, that offset prevented the Tribe from receiving any tax revenues until the enforcement of Montana's taxes was enjoined. J.A. 217.

2. This suit was initiated by the Crow Tribe in 1978 against the State of Montana, the counties of Big Horn, Yellowstone, and Treasure, and various state and county officials. The Tribe challenged the legality of the severance and gross proceeds taxes, arguing that they were preempted by federal law. Pet. App. 19. The district court dismissed the complaint for failure to state a claim. *Id.* at 197-227. The court of appeals reversed and remanded. *Id.* at 167-196. It held that the Tribe had alleged facts which, if proven, would establish that the challenged taxes were preempted by the Indian Mineral Leasing Act and infringed the Tribe's sovereignty and right of self-government. *Id.* at 185-196.

On remand, the district court in January 1983 enjoined Westmoreland's payment of the state severance tax, and ordered Westmoreland to deposit into the registry of the court amounts equal to those payable under the severance tax. Pet. App. 35. The prevailing party, the court held, would be entitled to the proceeds of the taxes so paid.[7] Also in 1983, the United States intervened on behalf of the Tribe in order to protect the United States' interests as trustee of the coal upon which Montana's taxes were levied. Pet. 5 n.2.

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[7] A similar order was entered as to the gross proceeds tax in 1987. Pet. App. 35.

3. After a trial in January 1984, the district court ruled for petitioners, holding that the taxes on tribal coal extracted from the ceded strip were not preempted by federal law. Pet. App. 110-166. The court of appeals reversed, *id.* at 88-109, holding that the severance and gross proceeds taxes on the Tribe's coal caused the Tribe significant injury (*id.* at 97):

> The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Because the taxes interfered with the "firm federal policy of promoting tribal self-sufficiency and economic development," *id.* at 95, the court of appeals held that they were presumptively preempted, unless supported by a sufficient state interest, *id.* at 100.

Montana, the court continued, had not carried the "heavy burden" of establishing that its taxes on the Tribe's coal were narrowly tailored to support legitimate state interests. Pet. App. 103. To the contrary, the court explained, the evidence indicated that the coal taxes were not necessary to compensate Montana for the costs created by coal mining because revenues from state, local, and excise taxes on the mining activity were more than sufficient to offset the coal-related costs documented by Montana. *Id.* at 103-105. In addition, most of the revenue from the challenged taxes was devoted to purposes other than environmental and coal-related services. *Id.* at 104. As a result, the court of appeals concluded, Montana imposed its taxes on the Tribe's coal "to profit from the Indians' valuable coal resources" and not to fund services

required as a result of the coal mining activity. *Ibid.* Because Montana had no legitimate interest in appropriating the Tribe's mineral wealth, the court held, Montana's severance and gross proceeds taxes were not narrowly tailored to advance legitimate state interests, and thus were preempted by federal law. *Id.* at 105. For similar reasons, the court of appeals held that the taxes constituted an unlawful infringement upon the Tribe's sovereignty. *Id.* at 105-107.

Montana appealed to this Court, which summarily affirmed the judgment of the court of appeals. 484 U.S. 997 (1988). And the Court specifically declined to reexamine that holding the next Term when it sustained far more modest state severance taxes in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989). In so doing, the Court distinguished the taxes at issue here on the ground that they were "extraordinarily high"—producing a combined rate of "more than twice that of any other state's coal taxes"—and "imposed a substantial burden on the Tribe." *Id.* at 186 & n.17.

4. The case then returned to the district court for further proceedings. In 1989, the district court ordered transfer to the Bureau of Indian Affairs, to be held in trust for the Tribe, of the tax payments that Westmoreland had been depositing into the court's registry pursuant to the district court's earlier orders. Pet. App. 35. Those funds represented Westmoreland's severance tax payments beginning in 1983 and its gross receipts tax payments beginning in 1987, along with accumulated interest. *Ibid.*

The parties then turned their attention to the tax payments Westmoreland had made during the period between 1975 and the dates of the orders directing Westmoreland to deposit tax payments into the court registry. The United States and the Tribe filed amended complaints in which they sought to recover those payments, which

totalled approximately $58 million. Pet. App. 24-27, 243-260. They argued that the taxes had been determined to be unlawful, that Montana therefore was not entitled to retain the proceeds of the taxes, that the taxes had substantially injured the Tribe, and that the Tribe and the United States (as trustee of the coal that had been unlawfully taxed) were entitled to the proceeds of the unlawful taxes. *Id.* at 243-260.

Montana moved for summary judgment on various grounds, including that the district court lacked jurisdiction over what it asserted were, in reality, state-law claims for restitution; it also argued that in any event the United States and the Tribe had failed to make out the essential elements of the theories of restitution upon which they had relied. Pet. App. 72. The district court denied the motion for summary judgment, reasoning that the Tribe's request for restitution sounded in federal law and the federal courts have "broad equitable powers to construct a remedy" for the violation of federal law. *Id.* at 76. The district court further concluded that its power to fashion an equitable remedy under federal law was not limited by the scope of state-law causes of action for restitution. *Id.* at 79-84. Finally, the district court ruled that the question whether any equitable remedy (or which equitable remedy) would be appropriate turned on unresolved factual matters. *Id.* at 85.

The district court certified its order denying summary judgment for interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 61-66. Although the court of appeals originally granted permission for an interlocutory appeal, it subsequently concluded that permission to appeal had been improvidently granted and dismissed the appeal. *Id.* at 58-60. In so doing, the court of appeals explained that, in *Crow I* and *Crow II*, it had already rejected the contention

that the United States and the Tribe could not recover the proceeds of Montana's unlawful taxes. *Id.* at 59-60.

5. After conducting a second trial in 1994, Pet. App. 22-23, the district court denied restitution. *Id.* at 42-54. The district court relied on a number of factors that it believed undermined the United States' and the Tribe's claim of an equitable entitlement: (1) the Tribe did not provide significant governmental services to the ceded strip; (2) Montana's coal severance tax had been found to be lawful, as against Commerce Clause and Supremacy Clause challenges, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); (3) Montana provided certain governmental services to the Tribe; (4) the unlawfulness of Montana's coal taxes was not obvious during the relevant period; (5) the Tribe did not pay the taxes at issue, and Westmoreland, which had paid the taxes, had not sought to avoid or recover them; (6) the Tribe could have taken steps to try to cause Westmoreland to challenge Montana's taxes; and (7) even if Montana had not imposed the coal taxes, the Tribe would not have been able to impose a tax on the coal mined by Westmoreland, because the Department of the Interior had not approved the Tribe's effort to impose such a tax on coal mined in the ceded strip. Pet. App. 47-52.

6. The court of appeals reversed in relevant part, Pet. App. 1-16, holding that the district court had erred in concluding that the United States and the Tribe were not equitably entitled to the proceeds of the unlawfully imposed taxes, *id.* at 7-12. Although the Tribe had not paid the taxes at issue, the court held that the Tribe had stated a claim for equitable relief, because the taxes "had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, 'taking revenue that would

otherwise go towards supporting the Tribe and its programs.'" *Id.* at 11 (quoting *Crow II*, Pet. App. 107).[8]

The court of appeals further held that the factors the district court relied upon to reach a contrary conclusion were either irrelevant or contrary to earlier holdings of the court of appeals. Pet. App. 7-12. Specifically, it concluded that the trial court had ignored direct evidence that the Montana Legislature was aware that its coal taxes were potentially preempted, but had not put the contested revenues in escrow until well after the Tribe's lawsuit was underway. *Id.* at 9 & n.3. The court of appeals also emphasized its earlier holding, in *Crow I*, that Montana's coal taxes were "intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Id.* at 10. Finally, the court of appeals rejected the district court's reliance on the fact that Montana provided government services to the Tribe, because Montana would have furnished those services even if there had been no coal mining and because the costs to Montana of any coal-related services were more than

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[8] The court of appeals distinguished *United States* v. *California*, 507 U.S. 746 (1993). In that case, the United States had reimbursed a government contractor for state taxes the contractor had paid to California. Claiming that the taxes had been assessed in violation of state law, the United States sought to recover them in federal court. This Court held that the United States did not have a federal cause of action to recover the funds, because the contractor had settled its tax liability with California, there was no claim that California's taxes violated federal law, and the United States had failed to seek tax relief under applicable state procedures. *Id.* at 751-759. The court of appeals in this case pointed out that *California* was a case in which the United States had voluntarily agreed to reimburse its contractor, while the Tribe in this case had done nothing comparable. Pet. App. 16. It also pointed out that there had been no determination in *California* that California's tax was unlawful. *Id.* at 8 n.2.

offset by revenues from coal-related taxes other than those at issue. *Id.* at 11.

In sum, the court of appeals concluded (Pet. App. at 12):

> The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

The court of appeals therefore remanded the case for entry of an order directing Montana and Big Horn County to disgorge the unlawfully obtained taxes. *Id.* at 12. The court did not resolve outstanding disputes about whether the Tribe was entitled to prejudgment interest and attorney's fees. *Id.* at 12, 14.[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners no longer dispute that they obtained $58 million through unlawful taxes assessed on reservation coal owned by the Tribe. Nor do they dispute the conclusion—accepted by this Court—that their "unique," "unusually large," and "extraordinarily high" taxes "imposed a substantial" and unlawful "burden on the Tribe."

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[9] Before the district court, the United States and the Tribe had also sought additional relief on the ground that Montana's taxes had prevented the Tribe from entering into a lease with Shell Oil Co. for the mining of other coal owned by the Tribe. The district court denied relief because of a failure to show that the unlawful coal taxes were the cause of the breakdown of the relationship between the Tribe and Shell Oil Co. (Pet. App. 55), and the court of appeals affirmed the district court's judgment for similar reasons (*id.* at 12-14). This Court denied the Crow Tribe's cross-petition for a writ of certiorari seeking review of that ruling. 118 S. Ct. 73 (1997).

Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163, 186 & n.17 (1989). Instead, they argue that they must be permitted to retain the profits of their wrongdoing. Federal courts, they contend, are powerless to require disgorgement of the proceeds from even uncontested violations of federal law.

Petitioners' position is supported by neither logic nor law. To the contrary, it is well established that federal courts may, under their equitable powers, require parties like petitioners to disgorge the proceeds of their unlawful conduct. And that is precisely what the Ninth Circuit did below, requiring petitioners to return their unlawful profits to the Tribe, the owner of the coal from which petitioners had "intentionally and illegitimately * * * appropriate[d] most of the economic rent." Pet. App. 10.

Petitioners' contrary arguments, including their reliance on *United States* v. *California*, 507 U.S. 746 (1993), are premised on a fundamental legal error: Petitioners confuse the question of whether a cause of action under federal law exists (the question in *California*) with the question of the availability of equitable remedies under a cause of action that is conceded to exist (the question here). Once that analytical error is eliminated, the primary basis for petitioners' arguments—and petitioners' reliance on *California*—evaporates.

California held that, where state taxes were alleged to have been obtained in violation of state rather than federal law, the United States does not have a federal cause of action for their recovery simply because it reimbursed the contractor that paid the taxes. "[T]he Government cannot use the existence of an obligation to indemnify [its contractor] *to create a federal cause of action* for money had and received." 507 U.S. at 754 (emphasis added). Here, in contrast, there is no question as to whether the United States and the Tribes have a federal cause of action.

Repeatedly this Court and others have entertained actions, like this one, in which the United States or a Tribe challenges official conduct that interferes with the United States' fulfillment of its obligations to the Tribes or intrudes improperly upon the Tribe's federally guaranteed rights. Indeed, this Court has held that the United States and the Tribes may seek to enjoin such unlawful state activity notwithstanding the terms of the Tax Injunction Act, 28 U.S.C. 1341, which otherwise bars district courts from enjoining or setting aside state taxes. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-475 (1976).

The question in this case thus is not whether a cause of action exists. It is whether the remedy of disgorgement is available now that the Tribe and the United States have prevailed in establishing the illegality of the taxes at issue. Under this Court's precedents, the answer to that question is yes. Where a federal cause of action exists, federal courts properly "presume the availability of all appropriate remedies * * * unless Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992). Indeed, this Court expressly has held that "[i]t is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may properly be entered by a District Court once its equity jurisdiction has been invoked," and that "[n]othing is more clearly a part of the subject matter of a suit for an injunction * * * than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946).

Petitioners' remaining contentions are likewise without merit. While petitioners assert that the United States and the Tribe have not shown that they have a common-law

cause of action for assumpsit or "quasi-contract," the Tribe and the United States do not need to make such a showing. Having prevailed on their federal cause of action, they are entitled to the equitable remedy of disgorgement. And, in any event, the United States and the Tribe have proven their claim under the common law, and their right to the remedy of a constructive trust. Nor can it be contended that disgorgement is necessarily a legal, rather than equitable remedy, as petitioners suggest. Disgorgement, and constructive trusts in particular, are equitable in nature.

Finally, petitioners' contention that federalism concerns preclude relief is fundamentally mistaken. Montana law makes the remedy of disgorgement available when one of Montana's political subdivisions imposes taxes in derogation of the rights of another. It is fully consistent with our federal constitutional structure—under which the States ceded to the National Government the responsibility for Indian affairs—for a federal court to impose a similar remedy for Montana's knowing and unlawful taxation of the Tribe's coal in violation of the Tribe's sovereign rights and the United States' sovereign obligations under federal law.

ARGUMENT

I. THE UNITED STATES AND THE TRIBE HAVE A CAUSE OF ACTION, AND ARE ENTITLED TO FULL RELIEF, FOR PETITIONERS' INFRINGEMENT OF THE TRIBE'S FEDERALLY PROTECTED RIGHTS

As this Court repeatedly has recognized, the question whether there is a cause of action that a party may bring and the question of what relief is available under that cause of action are "analytically distinct." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).

When a court considers if there is a cause of action, it inquires whether the plaintiff is a proper party to bring suit for the asserted violation; when a court considers the question of remedies, it looks to what sorts of relief may be imposed if the plaintiff prevails on its cause of action. *Ibid.*; see 1 D. Dobbs, *Law of Remedies* § 1.6, at 25-27 (2d ed. 1993). This Court articulated that distinction in *Davis* v. *Passman*, 442 U.S. 228, 239 (1979):

> If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a "cause of action" * * *. So understood, the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a "cause of action" is employed specifically to determine who may judicially enforce the * * * rights or obligations.

See also *id.* at 240 n.18.[10]

Applying that well-established structure to this case demonstrates that petitioners' arguments are without merit. Here, there can be no dispute that the United States and the Tribe have a cause of action. This Court and other courts have for decades recognized a cause of

[10] Where only private plaintiffs are concerned, the Court has been cautious about recognizing rights of action to enforce an Act of Congress in the absence of legislative guidance; to recognize such private rights of action, the Court has explained, risks expansion of the judicial power. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990). Even in cases involving private plaintiffs, however, the Court has stated that "[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power." *Franklin*, 503 U.S. at 73-74. Because of the far broader right of the United States to sue to vindicate its sovereign interests, it follows *a fortiori* that the courts should have broad powers to fashion an appropriate remedy in such a suit.

action for, and entertained virtually indistinguishable challenges to, unlawful intrusions upon federally guaranteed Indian rights. See pages 19-22, *infra*. Nor can there be any dispute that federal courts have equitable authority to impose a restitutionary remedy. Such a remedy has long been considered inherent in the equitable authority of federal courts, and there is no good reason to find it unavailable here. Indeed, courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," *Franklin*, 503 U.S. at 66. See pp. 22-25, *infra*. That is especially so where, as here, the United States sues to protect property it holds in trust for Indian Tribes and the sovereign interests of the Tribes themselves.

A. The United States And The Tribe Have A Cause Of Action

It is firmly established that federal law provides both the United States, as trustee for the Indian Tribes, and the Tribes themselves, with a cause of action to challenge conduct by state and local governments that unlawfully impinges upon land held in trust by the United States for the Indians or upon other tribal interests protected by federal law. This Court has long entertained such actions by the United States. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 442 (1912) ("[T]he United States [was] entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealing which had finally led to the plan of separate [Indian] allotments accompanied by restrictions for the protection of [Indian] allottees"); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926) (United States has the "right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations" to the Indian Tribes).

As this Court has said with respect to the origins of the duty of protection of Indians by the United States generally:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. * * * From their weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. *Kagama*, 118 U.S. 375, 383-384 (1886).[11] Suits by the United States to protect Indian property and other rights therefore represent an especially appropriate occasion for invocation of the principle that "[e]very government * * * has a right to apply to its own courts for any proper assistance in the exercise of [its powers] and the discharge of [its duties]." *In re Debs*, 158 U.S. 564, 584 (1895).[12]

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[11] See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting relationship of the United States to Indian Tribes "resembles that of a ward to his guardian"); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974) ("unique obligation" toward Indians); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("unique trust relationship between the United States and the Indians"); *Lincoln* v. *Vigil*, 508 U.S. 182, 195 (1993).

[12] See *United States* v. *Board of County Comm'rs*, 251 U.S. 128, 133 (1919) ("Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred [upon them by Congress], the power existed in the officers of the United States to invoke [judicial] relief for the accomplishment of [that] purpose.").

Indian Tribes may also sue in their own name to prevent imposition of state and local action that interferes with their federally guaranteed rights. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 236 (1985) (Tribe may bring federal common law action for violation of federally guaranteed possessory rights). Similar actions have been entertained by Anglo-American courts for more than a century and a half. *Id.* at 235 (citing *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850)). Congress has confirmed that authority in 28 U.S.C. 1362, in which the Tribes in certain respects are accorded treatment similar to that of the United States when it sues on their behalf. 28 U.S.C. 1362; see *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474 (1976); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 784 (1991); see also *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (challenge by Tribe to cigarette and automobile taxes alleged to be inconsistent with Indian self-governance and sovereignty).

Indeed, this Court has held that federal courts may hold unlawful and enjoin state taxing schemes that improperly intrude on Indian sovereign rights in contravention of federal law, notwithstanding the Tax Injunction Act, 28 U.S.C. 1341, which otherwise bars district courts from enjoining or setting aside state taxes. *Moe*, 425 U.S. at 473-475; *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 761 n.2 (1985) (suit by Indian Tribe "to enjoin the enforcement of" state tax law "cognizable" in federal court; upholding injunction against challenged tax).

It is thus far too late in the day to argue that the United States and the Tribe have no federal cause of action to vindicate the Tribe's federally guaranteed rights against unlawful intrusion. Petitioners do not contend otherwise. See Pet. Br. 44 n.8 (listing numerous cases). Instead,

petitioners' only contention is that, even when a violation of a Tribe's federal rights is found, the federal courts lack authority to order the remedy of disgorgement. As we explain below, however, that cramped view of the remedial powers of the federal courts is inconsistent with settled law and this Court's precedents.

B. Federal Courts Have Authority To Provide A Full Remedy For Violations Of The Tribe's Federally Guaranteed Rights

1. The principle that federal courts have "power to award appropriate relief so long as a cause of action exist[s] under the Constitution or laws of the United States" has "deep roots" in this Nation's jurisprudence. *Franklin*, 503 U.S. at 66. "From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." *Ibid.* Indeed, even before this Nation was formed, the full and expansive remedial authority of courts was well established "in the English common law, and Blackstone described it as 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" *Id.* at 66 (quoting 3 W. Blackstone, *Commentaries* 23 (1783), and citing *Ashby* v. *White*, 87 Eng. Rep. 808, 816 (Q.B. 1702)).

Following those principles, this Court has held in a "long line of cases" that, "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin*, 503 U.S. at 69; accord *id.* at 68. And in a suit for equitable relief, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

The United States has repeatedly invoked the equitable powers of the federal courts to assist it in the protection of the Indian Tribes against unlawful encroachments by state and local governments, as well as by individuals. See, *e.g.*, *Ash Sheep Co.*, *supra* (suit to enjoin unlawful grazing of cattle on ceded strip of Crow Reservation); *United States* v. *Board of County Comm'rs*, 251 U.S. 128, 133-134 (1919) (upholding right of United States "to invoke the interposition of" a federal court in "equity" to prevent imposition of unjust and discriminatory taxes on lands belonging to the Indians); *Heckman*, *supra* (suit to cancel conveyances of Indian land made in violation of federal law); *United States* v. *Rickert*, 188 U.S. 432, 432 (1903) (suit by United States "for the purpose of restraining the collection of taxes" assessed by a State against members of the Sioux Tribe).

2. The equitable powers of federal courts include the authority to order the disgorgement of gains obtained in violation of federal law. This Court so explained over half a century ago: "It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may properly be entered by a District Court once its equity jurisdiction has been invoked," unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946). "Nothing is more clearly a part of the subject matter of a suit for an injunction," the Court continued, "than the recovery of that which has been illegally acquired and which has given rise to the

necessity for injunctive relief." *Id.* at 399;[13] see also *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) ("As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'") (quoting *Clark* v. *Smith*, 38 U.S. (13 Pet.) 195, 203 (1839)).

The remedy of restitution has been awarded, moreover, in the specific context of wrongful state intrusions into federally guaranteed Indian rights. See, *e.g.*, *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939) (recovery of taxes imposed on Indians in violation of federal law). Indeed, in *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920), this Court held that such a remedy for the benefit of Indians could not be denied, declaring that, "if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Id.* at 24.

It is precisely that established equitable authority that the court below exercised in this case. After reviewing the equities—including the facts that Montana acted "with wrongful intent," and that the Tribe was substantially injured as a result, Pet. App. 9-12—the court of appeals concluded that "[t]he equities in favor of restoring improperly collected revenues" to the Tribe are "strong" and that Montana should not be permitted to benefit from having "levied the unlawful taxes with the illegitimate

[13] The ability of equity courts to require restitution in the form of disgorgement has been recognized from the earliest times. As Professor Palmer explains: "In equity it has been traditional to hold a wrongdoer accountable for profits realized through the wrongful act." 1 G. Palmer, *The Law of Restitution* § 2.12, at 158 (1978); accord 2 Dobbs, *supra*, § 6.6(3), at 146 ("Equity * * * made the wrongdoer liable for any profits gained from his wrong.").

intent of appropriating most of the economic rent from the Tribe's coal." *Id.* at 12.[14]

II. NEITHER *UNITED STATES* v. *CALIFORNIA* NOR REFERENCE TO COMMON-LAW FORMS OF ACTION BARS RELIEF IN THIS CASE

Notwithstanding the inherent equitable authority of federal courts to fashion appropriate relief under established causes of action, petitioners argue that the courts below had no such power here. In particular, they argue that such relief is barred by this Court's decision in *United States* v. *California*, 507 U.S. 746 (1993) (Br. 25-33); that it is not consistent with the principles of the common law cause of action for "quasi-contract" or assumpsit (Br. 25-27, 37-40); and that it cannot be justified as "equitable" relief because it is legal in nature (Br. 26, 36-37). None of those arguments has merit.

A. *United States* v. *California* Does Not Address The Availability Of The Disgorgement Remedy Where, As Here, A Federal Cause Of Action Exists

Petitioners' primary contention is that this Court's decision in *California* precludes the relief provided in this case. That argument, however, "mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion

[14] Even the district court, which declined in the end to order restitution in the circumstances of this case, nevertheless recognized the broad remedial power of the federal courts to do so. Rejecting petitioners' motion for summary judgment (which argued that the United States and the Tribe had raised only state-law claims that were not appropriate for federal jurisdiction), the district court stated: "Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy." Pet. App. 76.

[this Court] attempted to clarify in *Davis*." *Franklin*, 503 U.S. at 69; see *Davis*, 442 U.S. at 239.

1. In *California*, this Court did not confront a question of remedies. Instead, it considered whether the United States had a federal cause of action in the first place. The United States sought to recover taxes that a federal contractor had paid to the State of California. 507 U.S. at 749. The state taxes were not alleged to have violated any federal right or distinct sovereign interest of the United States. Thus, the Court stated: "Unlike the typical tax immunity case, * * * we are not presented with a claim that the state tax is unconstitutional; instead, the question is whether the Federal Government may recover taxes it claims were wrongfully assessed under California law."[15]

Although the taxes were paid by a third party in violation of state rather than federal law, the United States argued that it had a federal cause of action to recover the taxes because it was obligated to indemnify its contractor, which had paid the taxes. This Court rejected that argument, holding that "the Government cannot use the existence of an obligation to indemnify [its contractor] to create a federal cause of action for money had and received." 507 U.S. at 754. As the Court summarized its holding:

> Today we hold that shouldering the "entire economic burden of the levy" through indemnification *does not give the Federal Government a federal common-law cause of action* for money had and received to challenge

[15] Accord 507 U.S. at 749 (claim was that "the State had misapplied its own law, taxing property that was outside the scope" of the relevant taxing provision); *ibid.* (United States' suit was predicated on claim that "California had classified and taxed" its contractor "erroneously under California law"); *id.* at 758 ("state-law action").

> a state tax on state-law grounds simply because it is the Government.

Id. at 759-760 (citation omitted; emphasis added).

The holding in *California* has no bearing on this case. Here, unlike in *California*, the question before the Court is not whether federal law provides a cause of action; it is settled that federal law does provide a cause of action for unlawful state infringement of federally guaranteed Indian rights. See pp. 19-22, *supra*. The only question is whether, given the existence of that cause of action, federal courts may invoke their broad equitable powers to fashion an appropriate remedy (in this case, disgorgement) for its violation. The answer to that question is not found in *California*'s holding that there is no federal cause of action for money obtained from a third party in violation of state law. It is instead found in the myriad cases holding that, "if a right of action exists to enforce a federal right," then "a federal court may order *any* appropriate relief." *Franklin*, 503 U.S. at 69 (emphasis added).[16]

[16] There are other significant distinctions between the present case and *California*. In *California*, the United States had voluntarily chosen to indemnify its contractor for state taxes, while in the present case Montana's illegal coal taxes were imposed over the Tribe's opposition. In *California*, the United States had failed to take advantage of administrative and state court proceedings in which it could have contested the legality of the state tax at issue, and had waited for years after the taxes were demanded to seek relief in federal court. 507 U.S. at 751, 756-759. In contrast, the Tribe in the present case promptly challenged the legality of Montana's coal taxes in the appropriate forum. Finally, in *California*, the United States was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party. *Id.* at 757. In the present case, the United States and Tribe are seeking redress for the exaction of coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. Those differences fully justify the

2. Furthermore, in *California*, the United States' claim not only was based on an asserted violation of state law, but also was purely derivative of the state-law rights held by its contractor. As the Court explained, "a federal action is inappropriate * * * because the Government is in no better position than as a subrogee of its contractor," which had only state-law claims. 507 U.S. at 752.

Here, in contrast, the parties that have brought this suit—the United States and the Tribe—are the direct holders of the very rights they assert; there can be no argument that their claims are derivative of those of another party.[17] Thus, unlike in *California*, it cannot be said that the United States and the Tribe are in "no better position than as a subrogee," 507 U.S. at 752, or in a worse

court of appeals' observation that "*California* involved an entirely different factual situation" from that of the present case. *Id.* at 16.

[17] Petitioners err in asserting (Br. 30 n.5) that the "Tribe's position with respect to the Montana taxes * * * was comparable for quasi-contract purposes to the United States' in *California*; i.e., the taxes did not invade the *Tribe's* immunity from state taxation." The United States could not claim a violation of its federal rights in *California*, since this Court had previously held that States may tax federal contractors even if the burden of such taxes ultimately falls upon the United States. *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982). Here, in contrast, the Tribe is asserting its own federal rights. As the Court explained in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 468 n.7:

> Our conclusions * * * that the District Court, with subject-matter jurisdiction over the Tribe's claims, properly entered injunctive relief in its favor implicitly embrace a finding that the Tribe, *qua* Tribe, has a discrete claim of injury with respect to these forms of state taxation so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs. Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing.

position, as petitioners contend (Br. 32-33). To the contrary, they are in a superior position, making a direct claim for violation of their *own* rights.[18]

B. Petitioners Distort The Nature Of The Relief Offered And Misconstrue Common-Law Principles

In addition to arguing that *California* announces an absolute rule barring recovery of restitution by the United States in a federal cause of action such as this—an argument we have shown in point A to be mistaken—petitioners attempt to derive similar barriers to relief from the common law. In particular, petitioners read (see Br. 29) the result in *California* as resting on a fixed premise concerning the nature of quasi-contractual relief —that recovery is prohibited in the absence of a relationship of "privity" between the claimant and the sovereign that collected the unlawful tax, such as where the claimant was the "payor" of the tax. At common law, petitioners assert (Br. 25-27), only the "payor" could recover under quasi-contract. See also Br. 36-40. Even the district court, which in the end declined to order relief on other grounds, rejected those arguments, Pet. App. 79-85, and properly so.

1. Like petitioners' reliance on *California* more generally, this argument too confuses the concept of a cause

[18] Petitioners insist (Br. 34-35) that it makes no difference that the taxes at issue in *California* were obtained in violation of state rather than federal law. But the only authority that petitioners cite for that proposition is the United States' brief in *California* itself. That brief cannot be taken as persuasive authority in a case in which the Court rejected the United States' position. In any event, the nature of the violation—specifically, whether it contravened state law or federal law —is unquestionably an important factor in determining whether to recognize a *federal* cause of action. Absent a sufficient federal interest (which was found lacking in *California*), violations of state law give rise only to state causes of action.

of action with the nature of the remedy sought. As Professor Dobbs explains in his treatise (1 Dobbs, *supra*, § 1.6, at 27):

> The theory invoked to justify relief is not a remedy. Nor is a named cause of action. For instance, "assumpsit," was a form of action at common law which connoted both a certain theoretical justification for relief and a remedy. The term assumpsit might be used loosely to refer to the remedy available, but the cause of action itself is not a remedy, nor is the form used to prosecute it.

Whether or not the United States and the Tribe had a state-law cause of action for "assumpsit" (or for the subset of assumpsit known as quasi-contract) under common law is thus irrelevant. What matters is that they *do* have a federal cause of action based on unlawful intrusion into federally guaranteed rights. Once that federal cause of action is properly invoked—and here the United States and the Tribe not only invoked it but prevailed—the federal courts have authority to award any appropriate remedy. See pp. 19, 22-25, *supra*; Pet. App. 76 ("Having established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy.").

Indeed, retreat into a cramped formalism derived from common-law forms of action (for "assumpsit" or "quasi-contract") is wholly inappropriate here, where the need for federal courts to have flexibility in establishing remedies for federal wrongs is largely unquestioned. "[T]he obligation to do justice rests upon all persons, natural and artificial, and if [the government] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

Chapman v. *County of Douglas*, 107 U.S. 348, 355-356 (1883); see also *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."). That is especially so in a case in which the United States invokes the equitable powers of the federal courts in order to ensure that the Nation honors its trust responsibility to the Indian Tribes and to protect the Tribes' sovereign interests.[19]

2. Even if we assume, arguendo, that the requirements of the common-law forms of action have some bearing on the availability of equitable relief for violations of federal law, proper analysis supports the judgment of the court below. The doctrine of quasi-contract is based on the historical legal fiction, developed at common law, that the law "implies" a contract between the parties—even where no agreement between the parties exists at all, such as where the defendant stole the plaintiff's watch—when necessary to prevent unjust enrichment. See generally 1 Dobbs,

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[19] To be sure, the ancient causes of action were referred to in the United States' and the Tribe's complaints, see Pet. Br. 25, but that makes no difference. Under modern pleading and practice rules, "[i]t surely ought to be of supreme irrelevance that the plaintiff's complaint speaks the ancient language of *money had and received* rather than *goods sold and delivered*, or that it uses any such terms at all." 1 Dobbs, *supra*, § 4.2(3), at 586 (footnote omitted).

supra, § 4.2(1), at 571-572.[20] Petitioners assert that the law will not "imply" a contract unless the claimant is in privity with the defendant, such as where the claimant is the "payor" of the unlawful taxes. See Br. 27, 30-31; see also Br. 29 (characterizing *California* as refusing to "imply a contract" between the United States and California where the taxpayer, not the United States, dealt with California, "because the taxing entity cannot be held responsible for whatever obligations the taxpayer may have with [the United States]").

The district court properly rejected that contention as without support in a case like this one. Pet. App. 80-81. Contrary to petitioners' position, a privity requirement has been repudiated by the courts where, as here, the claim is between two sovereigns over taxes allegedly paid to one sovereign in contravention of the rights of another. *Ibid.* Indeed, it is settled law in numerous States—in-

[20] As Professor Dobbs explains, the "implication" of a contract was a necessary adaptation in light of the limited forms of action or writs available at common law (1 Dobbs, *supra*, § 4.2(1), at 571):

> The common law forced the plaintiff to sue under one of a limited number of forms of actions or writs. Assumpsit was a good choice, but to make it work it was necessary for judges to relate the claim to some kind of contract, promise or undertaking. The common law judges were up to the task. They simply said that, although the defendant had promised nothing, if justice called for relief, then the law would imply a promise and then hold him liable on that implied promise.
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> * * * * *
>
> Courts explained liability in assumpsit [in such cases] by saying that the defendant was liable on an implied contract. Because the term "implied contract" might be confused with the idea of an implied in fact contract, judges sometimes use the term "implied in law contract" instead * * *. Another term for the implied in law contract is quasi-contract.

cluding Montana—that one taxing authority may recover taxes unlawfully imposed within its jurisdiction by another authority. Thus, in *Valley County* v. *Thomas*, 97 P.2d 345 (1939), the Montana Supreme Court held that Valley County could recover from McCone County taxes unlawfully obtained by the latter. Rejecting the very argument petitioners raise today—that only the payor could obtain the wrongfully assessed taxes—the court held that restitution was available despite the absence of privity. *Id.* at 366. Creating such obstacles to recovery, the court held, would be particularly inappropriate "in view of the general constitutional and legislative intent in Montana to do justice as directly as orderly processes permit, without unnecessarily circuitous, multiplici[t]ous or otherwise burdensome proceedings." *Ibid.*[21]

Numerous cases are to the same effect. See, *e.g.*, *Board of Highway Commissioners* v. *City of Bloomington*, 97 N.E. 280, 284-285 (Ill. 1911); *Humboldt County* v. *Lander County*, 56 P. 228 (Nev. 1899); *City of Salem* v. *Marion County*, 36 P. 163, 165 (Or. 1894) (rejecting privity requirement so as to permit city to recover taxes unlawfully collected by county). Indeed, this Court has entertained a similar action. See *Maryland* v. *Louisiana*, 451 U.S. 725,

[21] Petitioners cannot distinguish these cases by arguing that the Tribe did not have a valid competing tax here. As explained above (see p. 7, *supra*) and below (note 33 *infra*), the Tribe "[a]t all relevant times * * * had a valid coal mining tax applicable to the mining by Westmoreland," J.A. 286, which was not paid as a result of petitioners' unlawful duplicative taxation. Moreover, there is no logical reason why the rule that privity is not required in cases where one jurisdiction seeks to require disgorgement of a tax wrongfully collected by another should be confined to situations where the plaintiff jurisdiction has a competing tax. The prior rulings by the courts below in this case, which this Court has previously affirmed, make clear that the collection of the extraordinarily high state taxes deprived the Tribe of its ability to collect revenues in an equivalently concrete manner.

734, 753-760 (1981) (holding Louisiana tax unconstitutional on Commerce Clause grounds in suit brought by eight States for "injunctive relief against Louisiana or its agents collecting the Tax * * * as well as a refund of taxes already collected"). It is ironic for Montana to argue that federal law cannot afford the United States and the Tribe the remedy of disgorgement of taxes obtained in derogation of federally guaranteed rights when Montana's own common law permits such an action between Montana's political subdivisions.[22]

3. Even putting to one side the question of common-law actions in quasi-contract, the United States and the Tribe also requested that the proceeds of the unlawful tax be restored to the Tribe through the doctrine of constructive trust. Pet. Br. 25 (acknowledging that constructive trust was sought). A constructive trust has never required the implication of a contract between the parties. Instead, a "constructive trust" is an equitable remedy that "is imposed upon [the defendant] in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to [the plaintiff] is imposed upon him." Restatement of Restitution § 160, cmt. c, at 642-643 (1937); see also *id.* § 160, at 640-641 ("Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that

[22] For that reason, petitioners' reliance (Br. 29) on the absence of privity between the United States and the State in *California* is misplaced. There, the United States was seeking relief not in its sovereign capacity, but rather simply by virtue of its contractual arrangements with a private party. 507 U.S. at 757. In the present case, the United States and the Tribe are seeking relief from unlawful coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. As shown above, the courts do not impose a privity requirement in disputes between sovereigns, *qua* sovereigns, over tax funds.

he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."); see also pp. 38-40, *infra* (explaining origins of constructive trusts in equity).

For that reason, neither the Court's refusal to imply a contract in *California*, nor the purported requirement of privity upon which that refusal supposedly was based, precludes the relief ordered by the court below. Instead, that relief is justified by the doctrine of constructive trust, which does not rest on an implied contract, has no privity requirement, and was not even addressed by the Court in *California*.

Petitioners maintain—in a single footnote (Br. 36 n.6) —that a constructive trust theory cannot justify the decision below. But petitioners never raised those arguments before the Ninth Circuit, either in their brief on the merits or their petition for rehearing. Nor are their arguments included within the question presented, which does not address whether the Tribe could obtain the remedy of a constructive trust. Instead, it asks only whether "an Indian tribe * * * [may] recover in quasi-contract." Pet. i. It is this Court's settled practice not to address in the first instance arguments that are outside the scope of the question presented and that were not presented to the courts below. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533-534 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Salinas* v. *United States*, No. 96-738 (Dec. 2, 1997), slip op. 8. Application of that rule is especially appropriate here, because petitioners' contentions depend on factual issues that the lower courts are best equipped to resolve in the first instance.[23]

[23] Petitioners' claims are, in any event, without merit. Petitioners first argue (Br. 36 n.6) that the request for a constructive trust is irrelevant because a constructive trust "is properly viewed as a form of

C. The Restitutionary Remedy Ordered By The Court Of Appeals In This Case Was Within The Equitable Powers Of The Federal Courts

Although it is clear that federal courts have inherent power to impose an equitable remedy for a violation of

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remedy, not a substantive cause of action." Here, however, there is a substantive cause of action, as this Court recognized in *Minnesota*, 270 U.S. at 194; *Colville*, 447 U.S. at 134; and *Moe*, 425 U.S. at 468 n.7. See pp. 19-22, *supra*. The question is whether the constructive trust remedy is available in that cause of action; petitioners offer no reason why it should not be available.

Petitioners also argue that, if a constructive trust were imposed, the recovery here would be excessive: A constructive trust, they contend, can be applied only to specific property (a traceable corpus), and cannot be applied to funds that have been dissipated. 1 Dobbs, *supra*, § 4.3(2), at 591; 2 Dobbs, *supra*, § 6.1(3), at 12-14 (funds otherwise held in constructive trust that are dissipated and not traceable cease to be recoverable). Much of the unlawfully collected taxes, petitioners maintain (Br. 36 n.6), has already been spent. That argument is outside the question presented not only because it does not relate to "quasi-contract," but also because it goes to the proper measure of relief, not whether there is any relief available at all. See Pet. i (asking only whether the Tribe can recover, not whether the recovery here was in an appropriate amount). In any event, petitioners concede that at least $13 million (plus accumulated interest) on their unlawful gains remain in the constitutional trust fund, and their contention that the remainder was "dissipated" is best reviewed by the lower courts in the first instance.

Finally, petitioners argue (Br. 36-37 n.6) that a plaintiff seeking a constructive trust must make out the elements of a cause of action in assumpsit. But the authorities petitioners cite at no point indicate that there is a privity requirement in order for a constructive trust to exist, and petitioners cite no case law to that effect. To the contrary, like all equitable remedies, constructive trusts are designed to be applied flexibly and tailored to situations in which a count for assumpsit may or may not lie. Indeed, this Court imposed a constructive trust in *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), without any discussion of the elements of a claim in assumpsit.

federal rights where a federal cause of action exists, petitioners argue that the remedy imposed here was not equitable in nature. In particular, petitioners argue that, because quasi-contract actions sound in law rather than equity, restitution cannot be justified as equitable relief for the violation of the Tribe's federally guaranteed rights. See Pet. Br. 26 (citing 1 G. Palmer, *The Law of Restitution* § 1.2, at 9 (1978), for the principle that "quasi-contract" is "an action at law"); *id.* at 36 ("quasi-contract was a form of action that developed at *law*, not in equity, to remedy a breach of a judicially implied contract"). That argument is not only contrary to petitioners' position below—where they acknowledged that both "quasi-contractual obligation" and "constructive trust" are "forms of restitution [that] are viewed as equitable in nature," J.A. 340—but also irrelevant and incorrect.

1. The argument is irrelevant because it once again confuses cause of action with remedy. Whether a cause of action for "quasi-contract" or "assumpsit" sounds in law or equity, the United States and the Tribe do not need to rely on that particular common-law cause of action because they have a federal cause of action based on petitioners' unlawful intrusion into their federally guaranteed rights. See pp. 19-22, *supra*. Having stated a claim for and prevailed on that cause of action, they are entitled to any appropriate relief, including disgorgement of petitioners' unlawful gains. See pp. 22-25, *supra*. And there can be no dispute that the relief for a violation of federal law can include a requirement that the defendant disgorge his ill-gotten gains. See, *e.g.*, *Porter*, 328 U.S. at 399 (holding that "a decree compelling one to disgorge profits, rents or property acquired in violation of [federal law] may pro-

perly be entered by a District Court" under its "equity jurisdiction").[24]

2. Petitioners' argument is incorrect because their assertion that restitution is necessarily a form of "legal" rather than "equitable" relief is unsound. This Court not only has recognized that "restitution" is "traditionally viewed as 'equitable'," *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993); see *id.* at 263 (White, J., dissenting) (referring to "restitution" as one of "the 'traditional' equitable remedies"), but repeatedly has upheld restitutionary orders as such. See, *e.g.*, *Porter*, 328 U.S. at 399 (upholding disgorgement as within a federal court's "equity jurisdiction"); *Mitchell*, 361 U.S. at 291-292 (referring to "the historic power of equity to provide complete relief").[25]

History supports this Court's view (and petitioners' concession) that restitution does constitute "equitable" relief. Indeed, the commentators agree that restitution has both legal and equitable roots. See 1 Dobbs, *supra*, § 2.1(2), at 62 ("both law courts and equity courts made restitutionary awards"); *id.* § 4.3(1), at 586-687 (detailing equity's contribution); Davis, *Restitution: Concept and Terms*, 19 Hastings L.J. 1167, 1167 (1968) ("The roots of

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[24] For this reason too, it is not at all clear whether characterizing the relief as "legal" or "equitable" makes a difference. Once a federal cause of action is stated, federal courts have full power and authority to enter any appropriate relief, legal or equitable, to remedy the violation, unless Congress expressly provides otherwise. See pp. 22-25, *supra*.

[25] Amici's attempt to distinguish *Porter* on the ground that it merely restored the status quo ante (NCSL Amici Br. 14-15) is without merit. It is a fundamental principle that disgorgement is measured not by the plaintiff's loss but rather by the defendant's gain, and it is thus well recognized that it restores *the defendant* to status quo ante, although it may not have precisely that effect on the plaintiff. See 1 Dobbs, *supra*, § 4.1(1), at 550-551; see also pp. 48-49, *infra*, and sources cited therein.

restitution can be traced to some of the earliest common law proceedings in debt and account and, due to procedural difficulties in these actions, to some of the first bills in chancery.") (footnotes omitted).

Indeed, while the cause of action for assumpsit (or quasi-contract)—the cause of action upon which petitioners almost exclusively focus—may have developed at common law, courts of equity offered comparable relief *before* that innovative cause of action was adopted. In fact, assumpsit was developed by the common law courts in *response* to the popularity of the equitable remedies available in the courts of chancery. As one commentator explains, it was "[b]ecause of the popularity of seeking relief in chancery" that "the jealous common law courts developed the action in assumpsit." Davis, 19 Hastings L.J. at 1167; accord Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 14 (1888); see also 1 Dobbs, *supra*, § 4.3(1), at 588-589 (characterizing constructive trust and other remedies as "largely 'equitable'").

In any event, it is virtually undisputed that the doctrine of constructive trust comes exclusively from the equity side of the courts. While law courts were often barred from affording relief where the defendant held legal title or the claim could not be wedged into a common-law form, courts of equity were not so limited. As Professor Dobbs explains (1 Dobbs, *supra*, § 4.3(1), at 587):

> Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property. [Rather than ordering damages as the law courts would], [e]quity courts would express the defendant's liability to reconvey by calling him a constructive trustee.

Once it called the defendant a "constructive trustee," the equity court would simply enter an in personam order requiring the trustee to transfer title and possession of the disputed property or funds to the constructive beneficiary. *Ibid.*; 1 Palmer, *supra*, § 1.3, at 9-16 (recognizing constructive trust as having its origins in equity and as affording "relief in equity").[25]

D. A Disgorgement Remedy Is Consistent With Equitable Principles and Federalism Considerations

Petitioners' broad request for immunity from restitution based on the nature of restitution or the power of the federal courts to impose such a remedy must fail, for the reasons already stated. Petitioners offer, however, a series of case-specific reasons why, in their view, such a remedy is inappropriate here. But petitioners fail to come to terms with the most important equitable facts in this case—that they "levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal," with full knowledge that the taxes "were potentially preempted," and with the expectation that "court decreed settlements" like the one entered in this case "would be required to resolve their legality." Pet. App. 9, 12. In any event, petitioners' various arguments are without merit.

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[25] Petitioners also argue that, if equitable, restitution should not be permitted where there is an adequate remedy in damages. Pet. Br. 37 ("The availability of a legal remedy is dispositive."). But it is settled law that "[t]he availability of restitution is not dependent upon inadequacy of the alternative remedy." 1 Palmer, *supra*, § 1.6, at 33. In any event, petitioners advert to no finding that a damages remedy is available, and, if available, adequate in this case. Indeed, their amici assert that legal relief is not only inadequate but unavailable. NCSL Amici Br. 10-11 (it should have been "obvious to the Tribe from the start that there was no adequate remedy at law and that its only remedy was to seek to enjoin the State from collecting the tax").

1. Petitioners first contend (Br. 37-40) that federal courts ought not be permitted standardless discretion to afford restitutionary relief. What the Ninth Circuit applied here, however, was not standardless discretion. Instead, the Ninth Circuit applied the well-settled equitable principle that, when an injunction has been entered to prohibit the unlawful acquisition of property, a second injunctive decree may be entered to require the wrongdoer to disgorge any unlawfully obtained profits. As this Court explained a half-century ago in *Porter*, 328 U.S. at 398-399:

> It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of [the federal statute] may properly be entered by a District Court once its equity jurisdiction has been invoked[.] * * * Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.

Petitioners' contrary argument is based on the unwarranted assertion that no equitable relief should be available unless the United States and the Tribe demonstrate that they are entitled to relief under quasi-contract principles. Pet. Br. 40 (federal court remedial powers for violation of federal law must be based on the "rich history of quasi-contract law"). The United States and the Tribe do not have to demonstrate that they have a cause of action in quasi-contract because they have a cause of action under federal law for Montana's unlawful interference with the Tribe's federally guaranteed rights. See pp. 19-

22, *supra*.[27] Petitioners do not cite a single case holding that a plaintiff cannot obtain equitable relief, by means of constructive trust or disgorgement, for a violation of federal law unless the plaintiff can make out the elements of a common-law cause of action in assumpsit.[28] And given the historical origins of those equitable remedies, any such

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[27] Both have, moreover, demonstrated that they are entitled to prevail under the theory of assumpsit and the doctrine of constructive trust. See pp. 31-36, *supra*.

[28] The cases cited by petitioners in no way suggest that equitable relief is available only where a plaintiff can prevail on a common-law cause of action for assumpsit. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975) (see Pet. Br. 38), held that a plaintiff needs to establish the "traditional prerequisites" for preliminary equitable relief, in that case a showing of irreparable harm so as to justify a preliminary injunction. *Rondeau* says nothing about the need to prevail on a common-law cause of action in order to obtain an equitable remedy for a violation of federal law. Similarly, in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940) (see Pet. Br. 39), the Court held that equitable relief is available under 15 U.S.C. 77v, provided that the plaintiff's "bill states a cause of action when tested by the customary rules governing suits of such character." 311 U.S. at 288. Contrary to petitioners' contention, the remaining discussion says nothing about meeting the requirements for recovery under "quasi-contract" or any other common-law legal action. To the contrary, it simply notes that the plaintiffs had alleged sufficient facts to state a claim under Section 12(2) of the Securities Act of 1933, 15 U.S.C. 77*l*(2) (1952) (now codified at 15 U.S.C. 77*l*(a)(2) (Supp. I 1995)). Nor does *Lonchar* v. *Thomas*, 517 U.S. 314 (1996) (Pet. Br. 39), assist petitioners. There, this Court declined to allow federal courts to dismiss habeas petitions for delay based on *ad hoc* equitable principles, because the habeas statute dealt with the issue of delay directly and allowed dismissal only where delay prejudiced the respondent. 517 U.S. at 326-329. Here, in contrast, the court below did not award a remedy without reference to the requirements for relief. To the contrary, it made certain a cause of action existed and that the United States and the Tribe had prevailed before entering the traditional equitable remedy of disgorgement of petitioners' unlawful gains.

requirement would be wholly inappropriate. The doctrine of constructive trust and the remaining equitable restitutionary remedies were developed to provide a remedy precisely in those situations in which the plaintiff, despite a sound claim of equitable entitlement, could *not* prove his cause of action at law.[29]

Reference to state law confirms the appropriateness of granting such relief here. While state law will not be permitted to "destroy the federal right which is to be vindicated," federal courts can and sometimes do refer to state law remedial frameworks when that law, although not "the source of the right," is "not deemed inconsistent with federal policy." *Board of County Comm'rs*, 308 U.S. at 350, 352. Here, it is undisputed that Montana law would afford one county the remedy of restitution if another county obtained tax funds in violation of the first county's sovereign rights, even absent privity between them. See *Valley County*, 97 P.2d at 366; see also pp. 32-34, *supra*

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[29] Professor Dobbs explains (1 Dobbs, *supra*, § 4.3(1), at 586-587):

> In property cases, a major limiting factor on restitution at law [as opposed to in equity] was the conception of formal title, beyond which courts could not examine. The ejectment claim was a restitutionary device, but not one that helped unless the plaintiff had good title at law. Equities in the plaintiff's favor were of no help at all. The plaintiff who was led by the defendant's fraud to convey his land had no remedy in ejectment because he had no title. * * *
>
> Equity's advantage in fashioning restitutionary remedies was exactly at this point: equity had developed a method of sidestepping title problems. Equity's theory was that it did not decide title but acted *in personam*. It did not act on title or property but upon the person of the defendant, compelling him to follow good conscience rather than good title. If the defendant had secured legal title to Blackacre by unconscionable acts, the equity courts could simply order the defendant to reconvey Blackacre to the plaintiff.

(discussing *Valley County*); Pet. App. 80. There is no good reason why federal courts should not be able to offer the same remedy here simply because it is the Tribe's federally guaranteed sovereign rights, and not the state-law rights of a Montana county, that are at stake.[30]

2. Notwithstanding their knowing intrusion into the Tribe's federally guaranteed rights, petitioners claim (Br. 41-43) that the remedy imposed here is inconsistent with federalism principles. It is difficult to see how petitioners can invoke federalism principles to defeat a remedy that Montana courts regularly provide in suits between Montana counties. See pp. 32-34, 43-44, *supra*. But even setting that defect aside, petitioners seek not respect but rather broad immunity from liability for intruding upon the rights of Indian Tribes—a subject that is the "exclusive province" of federal law under the framework of federalism adopted by the Framers. *County of Oneida*, 470 U.S. at 224. Petitioners do not ask that Montana's state taxation scheme be permitted to remedy the federal injury to the Tribe and the United States without judicial interference. They concede that those processes will afford the United States and the Tribe no relief at all. See Pet. Br. 30 n.5; see also NCSL Amici Br. 10-11.

For that reason, petitioners' reliance (Br. 41-43) on *National Private Truck Council, Inc.* v. *Oklahoma Tax*

[30] Indeed, the additional factors cited by the Court in *Board of County Commissioners* as weighing against the provision of the remedy at issue there—interest—weighs in favor of a fully restitutionary remedy here. Not only does Montana allow its counties to recover taxes from each other directly, contrast 308 U.S. at 352 (State did not provide interest on refunds to its taxpayers), but Montana had actual knowledge of the potential invalidity of its taxes from the outset, and imposed them nonetheless, contrast 308 U.S. at 352-353 (relying on the fact that Kansas acted in good faith and the United States delayed notifying Kansas of the claim for eight years).

Commission, 515 U.S. 582, 586 (1995), and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 111 (1981), is misplaced. In those cases, the Court held that 42 U.S.C. 1983 does not authorize the bringing of federal damage and injunctive claims by taxpayers when taxpayers *do* have access to full, fair, and effective remedies for their federal rights through state administrative processes.[31] Petitioners surely cannot invoke the same principle of "respect" for state administrative tax processes where those processes provide the United States and the Tribe with no redress for Montana's violation of federal law. Any such rule for the federal courts would not only undermine the federal trust responsibilities to the Indians, but would also be inconsistent with the Supremacy Clause and fundamental notions of due process. See *Board of County Comm'rs*, 308 U.S. at 350-351 ("Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated * * *. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law.") (citations omitted); *West Virginia* v. *United States*, 479 U.S. 305, 312 (1987) (following *Board of County Commissioners* in declaring that, "while courts must show 'solicitude for state interests * * *,' these interests may be overridden to avoid injury to 'clear and substantial interests of the

[31] See *National Private Truck Council*, 515 U.S. at 585-586 (addressing availability of relief "under § 1983 when adequate remedies exist under state law"); *id.* at 588, 591; *Fair Assessment*, 454 U.S. at 116 (taxpayers may not use Section 1983 to challenge validity of state taxes and must instead use state remedies, "provided of course that those remedies are plain, adequate, and complete").

National Government'") (quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)).

Finally, contrary to petitioners' unsubstantiated assertions that providing equitable relief would be "draconian" (Pet Br. 43), the effect of the Ninth Circuit's order is quite limited. Not only is such relief available only to sovereign parties like the United States and the Tribe that do not have adequate state remedies for their federal rights, but it is bounded by the doctrine of state sovereign immunity. Unless a State's immunity is waived or validly abrogated, a suit like this one will be available only where the United States itself sues to invoke the aid of federal courts in removing state "obstacles to the fulfillment of its obligations" to the Indian Tribes. *Minnesota*, 270 U.S. at 194; contrast *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997). Given the magnitude and circumstances of the adoption of the state taxes that this Court has already held to be invalid in this very case, it could not plausibly be suggested that the United States has taken an unrestrained approach here. There likewise is no evidence that the United States has abused that power in the past, and there is no reason to believe it will not exercise it responsibly in the future.

3. Petitioners' final argument is one of mitigation. Immunity from taxation affecting tribal property is a complex area of law, they assert, and the outcome was far from certain in this case. See Pet. Br. 43-48; NCSL Amici Br. 11-12, 18-21. Even assuming that such a naked plea for rebalancing of the equities can be considered within the question presented—which asks only about the availability of relief, not the correctness of affording it here—the argument is without merit.

Despite petitioners' lengthy discussion (Br. 43-48) regarding the complexity of Indian taxation issues, they nowhere dispute that the Montana Legislature, at the time

it enacted the severance and gross proceeds taxes, knew that those taxes potentially infringed upon the federally guaranteed rights of the Tribe and were therefore of questionable legality. The record not only shows that "Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal," but also that Montana "was aware that the taxes were potentially preempted and expected 'court decreed settlements' would be required to resolve their legality." Pet. App. 9, 12. Surely petitioners cannot rest on the supposed complexity of Indian taxation law as a basis for resisting equitable relief when they imposed their taxes despite actual knowledge of their potential infirmity. To the contrary, that knowledge weighs heavily in favor of affording full relief. The contrary rule petitioners promote—that disgorgement not be available—would invite a cavalier attitude toward federally guaranteed Indian rights. As this Court has observed, where parties "face[] only the prospect of an injunctive order, they * * * have little incentive to shun practices of dubious legality." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975).

For the same reason, the contention of petitioners' amici that prospective relief provides appropriate deterrence is without merit. NCSL Amici Br. 10-12. Such a rule would give defendants every incentive to delay. Here, for example, petitioners strenuously opposed the preliminary relief ordered in 1983, arguing that the money "is recorded, traceable and refundable by the State," J.A. 191, and that preliminary relief was unnecessary because "the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment," J.A. 199. Had they succeeded in opposing that relief, they presumably would argue today that they must be permitted to keep all of the unlawful sums they exacted

not merely up to 1982, but to date. It is precisely that sort of unjust enrichment that remedial orders such as disgorgement are designed to prevent.

In fact, petitioners' theory not only would leave them unjustly enriched, but it also would leave the Tribe without any remedy for its injury. But for Montana's illegal taxes, the Tribe would have received substantially greater benefits from its coal, whether in the form of royalties or in the form of the severance tax it had unsuccessfully attempted to assess against Westmoreland. Pet. App. 11-12. "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976," but refused to do so because it would have had to pay petitioners' unlawful (and exorbitant) taxes at the same time. *Id.* at 12. These conclusions are amply supported not only by the record,[32] but also by subsequent events. Westmoreland in fact actually agreed to pay a tribal tax equal to the one it paid to petitioners (in 1982)—so long as it did not have to pay both petitioners' tax and the Tribe's—and consistently has paid that tax since petitioners' was invalidated.[33]

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[32] See, *e.g.*, Pet. App. 11-12 (detailing evidence supporting conclusion that Montana's coal taxes deprived Tribe of revenue); J.A. 87 (when Tribe sought to renegotiate its lease with Westmoreland in 1976, Westmoreland took the position that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax"); J.A. 286 (because the coal was part of the Reservation, "[a]t all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the Ceded Strip")

[33] Petitioners' fact-bound challenge to that conclusion does not warrant this Court's plenary review, and it is without merit in any event. While petitioners appear to rely on the Interior Department's purported disapproval of the Tribe's tax as applied to the ceded strip, petitioners overlook the fact that Westmoreland opposed approval of the Tribe's tax—and thereby caused the Department to withhold approval—precisely to avoid concurrent taxation. Pet. App. 31. In the absence of Montana's preexisting taxes, it is unlikely that Westmoreland would have resisted the Tribe's severance tax. More important still, the district court determined that the Tribe's tax in fact had been approved by the Department, and that the purported disapproval with respect to the ceded strip was without effect because the Department had proceeded from the mistaken assumption that the mineral estate under the surface of the ceded strip was not part of the Reservation, when in fact it was. J.A. 286; see pp. 6-7, *supra*. Petitioners did not challenge that ruling in the court of appeals, and they do not challenge it here.

In any event, petitioners' complaint that the amount of the restitutionary award may to some degree exceed the actual damage incurred by the Tribe is entirely beside the point. One of the acknowledged characteristics of restitution is that the recovery by the plaintiff may on occasion exceed the damage the plaintiff incurred, and that has never been thought to bar its imposition. See 1 Dobbs, *supra*, § 4.1(1), at 555 ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss."); see also *id.* at 551; *id.* § 4.3(2), at 592. That principle simply reflects the considered judgment, borne of history and experience, that the defendant ought not be permitted to be unjustly enriched by his misdeed, even if that is accomplished by transferring all of his profits to the plaintiff. Petitioners offer no good reason why the same principle should not be applied in remedying their knowing and unlawful efforts to supplant the Tribe as the rightful recipient of the economic value realized from exploitation of the Tribe's most significant Reservation resource.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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